Supreme Court, U.S.
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No. 95-193

In The

Supreme Court of the United States

October Term, 1995

JOLICOEUR FURNITURE COMPANY, INC., et al.,

Petitioners,

v.

CHARLES C. BALDELLI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On January 21, 1986, the Woonsocket, Rhode Island, city council passed an ordinance authorizing the contingent sale of two city-owned parcels of land to James Zagrodny. *Jolicoeur Furniture Co., Inc. v. Baldelli*, 653 A.2d 740, 744 (R.I. 1995); Appendix (A.)[1] 3. Zagrodny's interest in buying that land, as well as a third privately held lot, was engendered by the need to relocate the Jolicoeur Furniture Company. The former site had been taken by the state to build a bridge. *Jolicoeur*, 653 A.2d at 743; A. 2. The ordinance stated that "[t]he sale was conditioned on 'the submittance and approval of all plans by the Department of Planning & Development and the obtainment of all permits as required to implement the bidder's proposal.'" No buildable plans were submitted to the department until December 1987, the same month that Zagrodny sued the city, its mayor, and its planning director. *Jolicoeur*, 653 A.2d at 744; A. 3.

The intervening two-year period, between the passing of the ordinance and the filing of the suit, was a time of increasing frustration for Woonsocket city officials for two reasons: Zagrodny refused to move forward and two state administrative departments intervened. Initially, Zagrodny had demonstrated his earnest by submitting $1,500 to the city, but he also imposed his own conditions: 1) that he be able to purchase the privately owned property; and 2) that the city-owned lot, on which the state held an easement related to the bridge-building project,

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[1] All citations to the appendix refer to appendix A to the petition for a writ of *certiorari*.

be restored to its original condition. The easement was scheduled to expire in the spring of 1986 but the state department of transportation extended its time period. Then, the state department of environmental management informed the mayor that it had identified the land in issue for a park. *Jolicoeur*, 653 A.2d at 744; A. 4-5. Not only did the impending sale endanger the funding of that specific project, but the state indicated that, if the sale went through, Woonsocket would not receive future funding for like purposes. *Jolicoeur*, 635 A.2d 744-745; A. 5.

In the meanwhile, Zagrodny had submitted no plans nor taken any steps toward obtaining the necessary permits. Therefore, the city council on June 1, 1987, a year and a half after original passage, amended the ordinance to provide a 60-day time frame within which Zagrodny must act. *Jolicoeur*, 653 A.2d at 745; A. 5. Although some meetings were then held among city officials, Zagrodny, and his architect, the deadline came and went with little discernable progress. *Jolicoeur*, 653 A.2d at 745; A. 6. At that point the city council stepped into the fray. It held a workshop on the matter and suggested that Zagrodny submit his "plans" to the zoning board. That body approved a variance for the land. Subsequently, on November 16, 1987, the city council once again amended the ordinance to extend Zagrodny's deadline for submission of acceptable plans to December 31. *Jolicoeur*, 653 A.2d at 745; A. 7.

The mayor vetoed this second amendment on the grounds that, because of his dilatoriness, the city had no further obligation to Zagrodny. *Jolicoeur*, 653 A.2d at 746; A. 7. The council failed to override the veto on December

9, 1987. In an uncharacteristic burst of activity, in the next two weeks Zagrodny hired a lawyer, tendered full but rejected payment to the city financial director, attempted to submit plans to the planning director, and then filed suit on Christmas Eve. *Jolicoeur*, 653 A.2d at 746; A. 7-8.

A bifurcated trial was held in the superior court where, in July 1989, a justice of that court determined the liability and specific performance issues in favor of Zagrodny and Jolicoeur Furniture, leaving the damages to be tried to a jury. The award of specific performance was granted "subject only to the submission of plans to the Department of Planning and Development." *Jolicoeur*, 653 A.2d at 746; A. 8 (quoting the trial justice). By December 1989 Zagrodny had submitted acceptable plans and the city sold the real estate to him. *Jolicoeur*, 653 A.2d at 746; A. 8. In April 1992, a jury awarded $340,000 in compensatory damages based on various theories, including a claim brought pursuant to 42 U.S.C. § 1983,[2] and also awarded punitive damages against Woonsocket's, by then former, mayor and planning director. The defendants appealed and the plaintiffs cross-appealed. *Jolicoeur*, 653 A.2d at 747; A. 10.

The Rhode Island Supreme Court made various findings to resolve the many issues raised by the parties. The

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[2] The jury awarded $340,000 compensatory damages: they did not separate the damages due to breach of contract, tortious interference with contract, and the § 1983 claims. Thus, even though the Rhode Island Supreme Court determined that Zagrodny was not entitled to recover under § 1983, his compensatory damage award was unchanged.

state law claims and the compensatory monetary judgment with interest were sustained in Zagrodny's favor, ultimately resulting in a payment to him of $565,721.24. The court rejected the claims brought under § 1983 including the punitive damages awarded against the individual defendants. Pertinent to the questions raised in the petition, the court applied a "shocks the conscience" test to determine that there was no substantive due process violation. Additionally, the court concluded that the Fifth Amendment takings claim was insufficient to trigger the protections of 42 U.S.C. § 1983.

SUMMARY OF ARGUMENT

Respondents respectfully urge that the petition for a writ of *certiorari* be denied. There are two issues raised by the petition which, neither individually nor together, are sufficiently compelling for the Court's attention. First petitioners assert that there is a split among the circuits over the correct standard to be applied on reviewing a substantive due process claim. To the contrary, this Court has recently reiterated that the applicable standard is "conscience-shocking." That is the standard applied by the Rhode Island Supreme Court. It is also the standard applied by the circuit courts of appeals.

The second point with which petitioners take issue is the Rhode Island Supreme Court's holding that, as a matter of law, there was no sustainable 42 U.S.C. § 1983 claim. Petitioners were not able to show a violation of the Fifth Amendment Takings Clause upon which they based

the § 1983 action. The Rhode Island Supreme Court committed no error worthy of this Court's review.

REASONS FOR DENYING THE PETITION

I. The Rhode Island Supreme Court applied the customary standard on review of substantive due process claims.

The Rhode Island Supreme Court found "that plaintiffs have failed to demonstrate that any of these actions have in fact risen to a level of constitutional deprivation." *Jolicoeur*, 653 A.2d at 750; A. 16. The court reviewed the defendants' actions following the standard set forth in *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). While the *Amsden* standard is strict, it follows the dictates set forth by this Court for review of allegations of substantive due process violations.

A. This Court has established the relevant standard.

The "shocks the conscience" standard for determining whether there has been a violation of substantive due process was first used by this Court in *Rochin v. California*, 342 U.S. 165, 172 (1952). Other characterizations of the facts in that case were "too close to the rack and the screw" and "offen[sive] to a sense of justice." 342 U.S. at

172-73 (internal quotes omitted). Justice Frankfurter observed:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

342 U.S. at 172 (citation omitted). Forty years later the faculties of the clause are still indefinite and vague; the Court has shown little disposition to set firmer outlines to its contours. That is not to say, however, that there have been no beacons along the way.

In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), respondent claimed that he had a property right to continue his education in a specific program where he had failed to pass a key examination. 474 U.S. at 217. Reviewing whether the court of appeals had correctly applied the substantive due process doctrine, the Court framed the question as "whether the record compels the conclusion that the University acted *arbitrarily* in dropping Ewing from the Interflex program without permitting a reexamination." 474 U.S. at 225 (emphasis added). Although the university regularly allowed students to re-take the test, the Court found that Ewing's dismissal from the program was "not beyond the pale of reasoned academic decision-making." 474 U.S. at 228-29. Thus, another expression of the standard was added to

"shocks the conscience" as determinative of a substantive due process claim: "arbitrary."

Six weeks after the decision in *Ewing*, *Daniels v. Williams*, 474 U.S. 327 (1986), noted that: "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." 474 U.S. at 331 (original emphasis). Once again, the applicable standard was "arbitrariness." *Id.* The Court, however, was careful to point out that the Constitution does not supplant tort principles "in laying down rules of conduct to regulate liability for injuries that attend living together in society." 474 U.S. at 332. Rather, it protects large concerns.

Later in the same term, respondent in *Moran v. Burbine*, 475 U.S. 412 (1986), claimed a violation of his substantive due process rights when police gave false information to an attorney inquiring about Burbine's interrogation. Finding no transgression, the Court applied a "shocks the sensibilities of civilized society" test. 475 U.S. at 433-434. Had *Burbine* been the last case in the line, it would be possible to argue that the "shocks the conscience" test is reserved for police-conduct cases and that the "arbitrary" standard applies in other substantive due process contexts. However, the decision in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), thwarts such compartmentalization.

In *Collins*, a wrongful death case, the plaintiff asserted that the city's failure to provide a safe workplace violated her husband's substantive due process rights. 503 U.S. at 126. In its analysis of the claim, the standard

articulated by the Court was "arbitrary, or conscience-shocking, in a constitutional sense." 503 U.S. at 128. Thus, the test has one standard but two articulations: "arbitrary in a constitutional sense" is the same as "shocks the conscience" and considerably more rigorous than ordinary "arbitrariness." Therefore, it is not essential that formulaic words be used as long as the standard is strict. Although the *Jolicoeur* court cited language from the First Circuit, *Collins* validates the stringent standard applied there. The standard applied by the Rhode Island Supreme Court in *Jolicoeur* is the same as that enunciated in *Collins*.

B. There is no split between the circuit courts of appeals sufficient to merit this Court's attention.

Amsden v. Moran held that substantive due process protects from government conduct that is "egregiously unacceptable, outrageous, or conscience-shocking." Or, put another way: "In the substantive due process context, the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error." 904 F.2d at 754 n.5. Such characterization is strong stuff indeed and, at that time, the Third Circuit applied a much less rigorous test. *See, e.g., Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3rd Cir. 1988), *cert. denied*, 488 U.S. 822 (1988) (arbitrary or irrational); *Bello v. Walker*, 840 F.2d 1124 (3rd Cir. 1988), *cert. denied*, 488 U.S. 851 & 868 (1988) ("arbitrary, irrational or tainted by improper motive"). After the decision in *Collins* clarified the Court's requirements for successful invocation of substantive due process protection, the Third Circuit revisited the issue.

In *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir. 1994), the court sitting *en banc* determined that the decision in *Collins* required it to apply a "shocks the conscience" standard rather than the "reckless indifference" heretofore applicable in the Third Circuit. 22 F.3d at 1303.

> In light of the Supreme Court's unanimous adherence to the "shocks the conscience" test in *Collins*, the reckless indifference of government employees is an insufficient basis upon which to ground their liability for a police pursuit under the Due Process Clause. Such an inquiry is grounded in tort law, not in constitutional principles.

22 F.3d at 1306-07 (footnotes omitted). In deciding that its standard was inappropriate, the Third Circuit cited cases from seven other circuits, including the Second Circuit, which applied the "shocks the conscience" standard. 22 F.3d at 1303, 1305. In light of this marshalling of cases, any split among the circuits appears more illusory than real.

Even after *Fagan*, however, the Third Circuit does not necessarily articulate the standard as "shocks the conscience." Thus, in *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1995), reviewing a grant of summary judgment for the defendants, the court said: "[A] property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached." 53 F.3d at 593. That standard is certainly higher than the "reckless indifference" applied prior to *Fagan*. It is the "arbitrary in a constitutional sense" standard as enunciated in the alternative to "shocks the conscience" in *Collins*.

Fagan gathered the cases showing that there is not a split among the circuits. Different courts may articulate the substantive due process standard in different language but the terms are strict across the board. This Court mandated that strictness most recently in *Collins*. The Rhode Island court, following First Circuit precedent in determining the federal claims, also complied with the standard set by this Court. There is no significant split between the standard applied by the Rhode Island Supreme Court and those applied by the Circuit Courts of Appeals. There is, thus, no necessity for this Court to review the *Jolicoeur* decision.

C. The Rhode Island Supreme Court was correct in finding that there was no substantive due process violation.

The *Jolicoeur* court found that the defendants had not violated plaintiffs' substantive due process rights for two reasons. First, "[t]he city's activities could hardly be classified as 'conscience-shocking,' given its renewal of the deadline, the holding of a council 'workshop,' and repeated accommodations to plaintiffs' lack of activity concerning submission of the building plans." 653 A.2d at 751; A. 19. Thus, the court recognized that the plaintiffs bore some responsibility for the strained relations between the parties. Secondly, "[p]laced between the Scylla of loss of state funds and the Charybdis of violating the agreement with plaintiffs, that defendants fell into their course of action is not incomprehensible." *Id.* Therefore, the constitutional line was not crossed and the court held "as a matter of law that plaintiffs [were] not entitled to recover under 42 U.S.C. § 1983." *Id.*

Prior to taking up the merits of the claim, the *Collins* Court made an initial observation:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered [*sic*] area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

503 U.S. at 125. Moreover, "[t]here should be * * * great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental." *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986). Only six fundamental personal rights have been identified by the United States Supreme Court: the right to freedom of association, the right to vote and to participate in the electoral process, the right to interstate travel, the right to fairness in the criminal process, the right to procedural due process, and the right to privacy. 2 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.7 at 435-36 (2d ed. 1992). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, ___ U.S. ___, 114 S.Ct. 807, 812 (1994).

The Rhode Island court appropriately exercised judicial self-restraint in refusing to expand substantive due process protections as the *Jolicoeur* plaintiffs demanded. Only by identifying a new fundamental right, not yet

recognized by this Court, could the court have acceded to the contention that petitioners' 42 U.S.C. § 1983 claims were valid. Rather, the court properly applied this Court's conscience-shocking standard to deny that claim. Further, the court properly acknowledged that, simply because a defendant is a governmental unit, § 1983 is not automatically applicable. *Jolicoeur*, 653 A.2d at 751; A. 19. "[N]onexemplary governmental administrative actions do not automatically rise to the level of due process violations." *Silverman v. Barry*, 845 F.2d 1072, 1087 (D.C. Cir.), *reh'g en banc denied*, 851 F.2d 434 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988). The Rhode Island Supreme Court correctly determined that there was no violation of substantive due process considering the facts of this case.

II. The Fifth Amendment takings claim did not trigger the protections provided by 42 U.S.C. § 1983.

The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. Petitioners sued respondents in the Rhode Island Superior Court, seeking damages for the delay – the "temporary taking" – resulting from the city's breach of the contract. After a trial the jury decided for petitioners and awarded them $340,000 as full compensation for that delay. Although the trial justice conditioned a portion of the award on actual construction on the land in question, the Rhode Island Supreme Court upheld the entire jury award on appeal. *Jolicoeur*, 653 A.2d at 754; A. 26. Furthermore, petitioners' right to

receive 12% statutory prejudgment interest[3] was also sustained on appeal. Thus, payment of $565,721.24 was made to petitioners as compensation for their damages.

> As we have explained, however, because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 n.13 (1985) (original emphasis). "[A] property owner has not suffered a violation of the Just Compensation Clause until the owner has *unsuccessfully* attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation * * * ." *Williamson,* 473 U.S. at 195 (emphasis added). In this case, to the contrary, the petitioners successfully pursued their compensation claim. They prevailed in the superior court and that decision was sustained on appeal. They received full compensation. No property was taken without just compensation and, thus, no constitutional

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[3] Petitioners assert that the Rhode Island Supreme Court erroneously refused to countenance prejudgment interest for the period of time from the claimed date of breach in August 1987 until Zagrodny submitted plans in late 1989. However, the court specifically rejected that claim. It instead tied the interest to the date when Zagrodny finally complied with the conditions of the ordinance. In essence, then, petitioners wish to be paid interest for the delay period caused in no small part by their total inattention to their own business.

violation occurred. Therefore, there was no basis under the Takings Clause for a § 1983 action.

To successfully sustain a § 1983 claim, a plaintiff must prove that the underlying constitutional right was violated. *Daniels v. Williams*, 474 U.S. at 330. Here the underlying constitutional right is embodied in the Takings Clause. Where, as here, a regulatory taking is alleged:

> First, appellant must establish that the regulation has in substance "taken" his property – that is, that the regulation "goes too far." Second, appellant must demonstrate that any proffered compensation is not "just."

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986) (citations and footnote omitted).

Petitioners claim that the issue of whether they received their just compensation was presented to the Rhode Island Supreme Court which refused to reach it. Petition at 19. In fact:

> The plaintiffs cross-appealed * * * contending that the trial court erroneously reduced the jury's award of compensatory damages and abused its discretion when it failed to base its attorneys' fees award on current billing rates or, alternatively, failed to add prejudgment interest to an award based on historic billing rates.

Jolicoeur, 653 A.2d at 747; A. 10. The petitioners did not complain on appeal that the superior court proceedings failed to justly compensate them. Thus, their claim must rest on the proposition that the supreme court's adjustment of the interest period constitutes inadequate compensation. However, the supreme court tacitly reached

the just compensation question in making that adjustment by recognizing that petitioners' lack of compliance with the ordinance until 1989 was the source of a large part of the delay. The petition to this Court proclaims rather than demonstrates that they were unjustly compensated. Petitioners have not proven that the underlying constitutional right was violated as required by *MacDonald, Sommer & Frates*. Therefore, § 1983 protections are not available to them.

The Rhode Island Supreme Court held that petitioners were not entitled to recover under 42 U.S.C. § 1983 as a matter of law. *Jolicoeur*, 653 A.2d at 751; A. 20. That result was required under the settled law as enunciated by this Court. No further review of the proceedings in the state courts is necessary and the petition for writ of *certiorari* should be denied.

CONCLUSION

For all of the foregoing reasons, respondents respectfully urge that the petition for a writ of *certiorari* be denied.

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